

PEAM



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

United States Army Responsibility Under Joint
Payment Agreement--Reconsideration

Matter of: B-226540.2

File:

Date: August 24, 1988

DIGESTS

1. In response to a request for reconsideration, we find that the Army Corps of Engineers (Corps) has not submitted evidence sufficient to warrant reversing B-226540, Aug. 21, 1987, 66 Comp. Gen. 441, in which we held that the Corps was liable to a subcontractor for the Corps' breach of a joint payment agreement between the Corps, the contractor and subcontractor, where the Corps issued a check only to one party.
2. Proper measure of damages for breach of a joint payment agreement between the Army Corps of Engineers, the contractor and subcontractor is the amount the subcontractor would have received had the government check been issued jointly to the contractor and subcontractor as provided by the agreement. As that amount is not clear, at a minimum the Corps should pay the subcontractor the \$5,000 mentioned in the joint payment agreement as the value of the materials to be supplied by the subcontractor to the project. Should the subcontractor be able to prove further damages, the Corps of Engineers should make additional payments attributable to the breach.

DECISION

The Department of the Army, Corps of Engineers (Corps), requests reconsideration of B-226540, Aug. 21, 1987, 66 Comp. Gen. 441, in which we found that the U.S. Army (Army) should pay Southwest Construction Supply and Sales, Inc., a subcontractor, an amount equal to what it would have been paid had a joint payment agreement between the Army, the contractor, Security Fence Company, and Southwest Construction been implemented properly.

For the reasons given below, we affirm our decision. The Army breached the joint payment agreement and is liable to Southwest Construction. Although we agree that Southwest Construction has not sufficiently demonstrated what it is owed, at a minimum the Corps should pay Southwest Construction the \$5,000 mentioned in the joint payment agreement as the value of the materials to be supplied by Southwest

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Construction to the project. Should Southwest Construction be able to prove further damages, the Corps should make additional payments that are attributable to the breach.

BACKGROUND

The facts in this case were set forth in B-226540, Aug. 21, 1987. A subsequent inquiry pursuant to this request for reconsideration, however, has revealed additional facts that are important for resolution of this matter.

In July and August 1984, the Army entered into two contracts with Security Fence Co. for construction of fences at the Bert S. Kerr Area Office of the Tulsa District Corps of Engineers. The July contract (DACW 56-84-M-0931) was for \$23,285, and the August contract (DACW 56-84-M-1031), which is the subject of this decision, initially was for \$8,000.

Security Fence, as contractor, engaged Southwest Construction to provide materials for both projects. During performance of the July contract, Southwest Construction became concerned about its being paid by Security Fence, and asked the Corps to enter into a joint payment agreement between itself, the Corps and Security Fence. The agreement obligated the Corps of Engineers to issue checks payable jointly to Southwest Construction and Security Fence in consideration for Southwest Construction's continuing to supply materials for the project. This agreement was signed by all the parties on September 27, 1984. Although the contracting officer informs us he knew about this agreement, it was signed by an employee of the Corps Accounting and Finance Office. Two checks were issued jointly under this agreement in satisfaction of the contract award.

As the work proceeded on the two contracts, it became apparent that a mistake had been made in measuring the amount of fence area that had to be repaired, and that a substantial amount of additional work would have to be done. Both the contracting officer and the civil engineer on the project indicate that most of the additional work had to be done in the area covered by the July (931) contract, and only a small portion in the area covered by the August (1031) contract. Nevertheless, according to the contracting officer, since both contracts involved small purchase procurements, which he believed were limited to \$25,000, he did not think he could modify the 931 contract for the added cost and still stay within the limit. Instead, he agreed to modify the 1031 contract since the original amount was only for \$8,000 and thus could be substantially increased and not exceed the \$25,000 limit.

A further complication involved the manner in which the 1031 contract was modified. Instead of immediately executing a written modification, it appears that the Corps and Security Fence agreed that Security Fence would do whatever work was necessary and subsequently submit an invoice. Once the parties agreed on the amount owed, a written contract modification was to be concluded. The contract work was completed on March 12, 1985 and the written modification was made on April 3, 1985. It increased the contract price by \$15,318.

Southwest Construction also was concerned about being paid on the 1031 contract. The facts suggest that this concern was communicated to the Corps as early as November 1984 and continued through completion of the contract. Although Southwest Construction apparently was paid its share of the \$8,000 original contract price, when it became clear that it would have to supply additional materials, it informed the contracting officer that it would not continue performance unless the Corps entered into an agreement similar to that executed for the 931 contract. The contracting officer has told us that on this basis he orally agreed to enter into such an agreement but cannot recall exactly when this occurred. He did indicate, however, that the assurances he gave Southwest Construction preceded both Southwest Construction's final delivery of goods, and completion of the contract.

The written joint payment agreement for contract 1031 was concluded on March 28, 1985, again subsequent to completion of the contract work. The agreement obligated the Corps to issue checks payable jointly to Southwest Construction and Security Fence in consideration for Southwest Construction's agreement to continue to supply materials to the project. It also stated that the contract between the Corps and Security Fence included materials valued at \$5,000 that were to be supplied exclusively by Southwest Construction.

The affirmations of the contracting officer about the joint payment agreement conflict with an affidavit of November 19, 1987, in which he attested that the written joint payment agreement was the first and only communication and understanding by the parties about obligating the government to issue a joint check for contract 1031.^{1/} The contracting officer has informed us that the affidavit is incorrect. He says that he did not prepare the affidavit, he signed it quickly, and at the time either did not recall the prior

^{1/} In fact, the contract number mentioned in the affidavit is 1030. This appears to be a typographical error since only the 1031 and 931 contracts pertain to this matter.

oral agreement with Southwest Construction, or thought his statement referred only to a written joint payment agreement.

The Corps has submitted a sworn statement from a Corps District Counsel who discussed the joint payment agreement with the contracting officer just prior to the contracting officer executing the affidavit. The District Counsel's statement is consistent with the contracting officer's affidavit rather than the contracting officer's revised statement to us.

On April 17, 1985, a final check on the contract was issued for \$15,164.82. However, in conflict with the joint payment agreement which earlier had been received by the Corps' Finance and Accounting Office, the check mistakenly was issued only to Security Fence. Southwest Construction's efforts to obtain payment from Security Fence, including filing of a lawsuit, have been unsuccessful.

In B-226540, Aug. 21, 1987, 66 Comp. Gen. 41, we concluded that the Corps' need for timely performance by Southwest Construction provided consideration to support the direct contractual relationship between the government and Southwest Construction concerning payment. In this regard, we thought the facts showed that the contracting officer had entered into the agreement because he believed that without it Southwest Construction would not perform, thereby hindering completion of the project. Since the Army failed to make the \$15,184.82 check payable jointly to Southwest Construction as well as Security Fence as required by the agreement, we found the Army had breached the agreement. We also concluded that in view of the uncertainty about the amount owing to Southwest Construction, the Corps should require Southwest Construction to account to it for what it was owed from Security Fence, and then have the Corps pay that amount as the measure of damages for its breach of contract.

In accordance with our decision, the Corps requested Southwest Construction to supply copies of its invoices to support the amount owed. Consistent with its previous position, Southwest Construction claims it is owed \$7,514.2/. Although Southwest Construction did submit several invoices to the Corps, as suggested by the Corps, they are confusing and do not clearly show what Southwest Construction is owed.

2/ In B-221540, Aug. 21, 1987, Southwest Construction was claiming \$7,314, approximately half the proceeds of the \$15,164.82 checks.

The Corps of Engineers now argues that because the joint payment agreement had been concluded after the project had been completed and the last delivery of goods by Southwest Construction had been made, Southwest Construction never provided any consideration to the government in exchange for the government's entering into the joint payment agreement. Thus, the agreement is void. In this regard, the Corps emphasizes that the contracting officer's affidavit is controlling, and that the affidavit shows that the joint payment agreement for contract 1031 was entered into after the contract work was completed. The Corps also maintains that Southwest Construction has not submitted vouchers sufficiently evidencing what it is owed, assuming proper consideration.

Legal Discussion

Although the facts in this case are not entirely clear, we still affirm our conclusion in 66 Comp. Gen. 441 (1987) that the Army is liable to Southwest Construction for the Army's breach of the joint payment agreement.

In our view, Southwest Construction's promise to continue performance was consideration for the Corps' entering into the joint payment agreement. It is our conclusion that when it became clear that substantial additional work had to be done on the project, only after being orally assured that checks would be made payable jointly did Southwest Construction agree to continue to perform. We consider the written joint payment agreement to have, in effect, ratified that oral agreement.^{3/}

We agree with the Corps of Engineers that the apparent contradiction between the Contracting Officer's statements to us about having orally agreed with Southwest Construction to enter into a joint payment agreement when Southwest Construction suggested it would not continue performance without it and an earlier affidavit of his as well as a

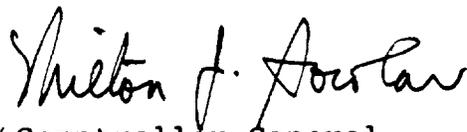
^{3/} We have held that oral agreements are not per se unenforceable. 55 Comp. Gen. 833, 835-36 (1976). In this instance, the oral agreement was subsequently embodied in the written joint payment agreement. Under the parol evidence rule, oral evidence of antecedent understanding's will not be admitted for the purpose of varying or contradicting a writing, but may be used for interpreting the writing. See B-177326, Aug. 29, 1973. The oral agreement here neither varies nor contradicts the written agreement and is necessary to understand the purpose of the written agreement, since the written agreement described events that already had occurred.

sworn statement of a Corps District Counsel executed on May 26, 1988, are troubling. Nevertheless, in this instance we think the oral statements are more convincing since they are more consistent with what actually occurred on the project.

As early as September 1984, Southwest Construction had indicated its concern about being paid by Security Fence, and had obtained a joint payment agreement on the 931 contract. The civil engineer on the project has confirmed that Southwest Construction continually voiced its concerns about being paid. We would think it odd if these concerns had not been communicated to the contracting officer. Furthermore, in view of the earlier agreement on the 931 contract--which the contracting officer states he was aware of--it makes sense that a similar arrangement would have orally been agreed to on the 1031 contract at that point when the contracting officer believed that Southwest Construction would not continue to perform.

The contracting officer's statements to us also suggest that he may have signed the affidavit quickly without fully understanding it, and may have understood his statement in the affidavit that the "'Joint Payment Agreement' constituted the first and only communication and understanding by the parties as to obligating the government to issue a joint check" to refer only to a written agreement rather than prior conversations.

Although we do agree with the Corps that Southwest Construction has not sufficiently demonstrated what it is owed, at a minimum, the Corps should pay Southwest Construction the \$5,000 mentioned in the joint payment agreement as the value of the materials to be supplied by Southwest Construction to the project. Should Southwest Construction be able to prove further damages, the Corps should make additional payments that are attributable to the breach.

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